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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

Through their counsel, Cavalier Telephone and NuVox hereby respond to Verizon's "White Paper" discussing the FCC's legal authority to adopt Verizon's intercarrier compensation reform plan.[1] Verizon proposes that the Commission transition to a uniform, default rate of $0.0007 per minute of use to terminate all traffic from all providers on the Public Switched Telephone Network ("PSTN"), regardless of jurisdiction or technology.[2] Verizon argues that the Commission has the legal authority to adopt its proposal because the Commission can lawfully preempt state access charge regimes and extend a single, federal default rate to traffic subject to Section 251(b)(5) of the Communications Act of 1934, as amended ("Act").[3] As discussed below, Verizon's arguments do not survive scrutiny. The FCC does not have authority to mandate the intrastate rates proposed by Verizon in its plan.

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1 "The Commission Has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN," Ex Parte Submission of Verizon, CC Docket No. 01-92 (filed Sept. 19, 2008) ("White Paper").

2 White Paper, at 1.

3 47 U.S.C. § 251(b)(5).

I. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO SET INTRASTATE ACCESS CHARGES

Verizon offers two arguments in support of its position that the Commission has the authority to preempt the states in setting intrastate access charges. *First*, Verizon argues that the growth of wireless and IP-based services makes it increasingly difficult for carriers to separate traffic into intrastate and interstate components for intercarrier compensation purposes, and there is no practical solution to this problem.[4] Verizon contends that the Commission therefore can justify preempting state access charge regimes on inseverability grounds.[5]

Second, Verizon argues that the Commission can look to the Supremacy Clause of the United States Constitution for authority. Verizon contends that the Commission can preempt state access charge regimes that differ from a federal default rate because these regimes pose an obstacle to the accomplishment of federal goals and policies, such as the development of a uniform system for all forms of intercarrier compensation.[6] Verizon's contention is that Section 2(b) of the Act[7] does not preclude such preemption, since the continued exercise of state authority over intrastate access charges would negate the exercise by the FCC of its own lawful authority and frustrate important federal policy objectives.[8]

As explained below, Verizon's arguments misstate or ignore relevant law and rely on overbroad and inaccurate generalizations regarding the state of the telecommunications marketplace and advancements in technology. As such, they do not provide a legally sufficient basis for the Commission's preemption of state access charge regimes.

Section 2(b) of the Act is well established as reserving to the states exclusive jurisdiction over all intrastate services, except where Congress has clearly carved out exceptions.[9] Federal court decisions confirm that in the absence of an express reservation of authority to the FCC, the Commission must respect the limits placed on its jurisdiction by

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4 White Paper, at 5-11.

5 *Id.*, at 15.

6 *Id.*, at 23.

7 47 U.S.C. § 152(b).

8 White Paper, at 25.

9 For example, Section 332(c)(3) of the Act gives the Commission exclusive jurisdiction over rates and entry of wireless carriers "[n]otwithstanding sections 2(b) and 221(b)." 47 U.S.C. § 332(c)(3)(A).

Section 2(b).[10] Indeed, the Commission itself has recognized these limits in refusing previous requests to preempt state access charge regimes.[11]

Despite Verizon's assertions to the contrary, the strict legal requirements that the Commission must satisfy to overcome Section 2(b)'s limits on its jurisdiction are not satisfied in this case. In *Louisiana Public Service Commission v. FCC*, the U.S. Supreme Court strongly confirmed the general jurisdiction of the states over intrastate communications, holding that the FCC may preempt state regulation of an intrastate matter *only* when the matter has interstate as well as intrastate aspects and when it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation."[12] Subsequent case law has refined the so-called "impossibility exception" to allow Commission preemption of state regulation only when each of the following criteria are met: (1) the matter to be regulated has both interstate and intrastate aspects; (2) Commission preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the Commission of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[13] As shown below, neither the second nor the third requirements are satisfied here.

While *Louisiana PSC* permits preemption of state regulation where it is not possible to separate the interstate and intrastate components of the subject matter,[14] the Commission has never found that there is anything inextricable about interstate and intrastate access services. Each interexchange minute passed over local exchange facilities has been jurisdictionalized as one or the other for decades. The states have regulated the rates for intrastate access minutes during that entire period, and continue to do so today. Indeed, when the

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10 *See, e.g., National Association of State Utility Consumer Advocates v. FCC*, 457 F. 3d 1238 (11th Cir. 2006) (despite the Section 332(c)(3) exception and conferral of exclusive jurisdiction over the rates for wireless services in the federal agency, the scope of the term "rates" in Section 332(c)(3) is not so broad as to prevent the States from regulating line items on wireless customers bills).

11 See, e.g., *MTS and WATS Market-Structure,* Third Report and Order, 93 FCC 2d 241, 264 ¶69 (1983) (rejecting request to preempt state regulation of intrastate access charges) ("*MTS/WATS I*"); *In the Matter of MTS and WATS Market Structure,* Second Supplemental Notice of Inquiry and proposed Rulemaking, CC Docket No. 78-72, 77 F.C.C.2d 224, 232, ¶38 (1980) ("*MTS/WATS II*") (subsequent history omitted) (federal requirements regarding interstate access charges can be used as a model for intrastate interexchange access service compensation arrangements "if the states chose to follow it").

12 *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 375 n. 4 (1986) ("*Louisiana PSC*").

13 *Pub. Serv. Comm'n of Maryland v. FCC,* 909 F.2d 1510, 1515 (D.C. Cir. 1990), *citing Illinois Bell Tel. Co. v. FCC,* 883 F.2d 104, 113 (D.C.Cir.1989); *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 880 F.2d 422, 431 (D.C.Cir.1989).

14 *Louisiana PSC*, at 375 n. 4.

modern access charge regime was constructed in the early 1980s, the Commission considered and expressly rejected, on the basis of the clear divisions created by Section 2(b), arguments that it preempt state regulation of intrastate access charges.[15] Verizon has not shown why preemption is required today.

Verizon suggests that for some traffic, namely VoIP and wireless traffic, it is not realistically possible to separate intrastate calls from interstate calls. In Verizon's view, this justifies preemption of intrastate rate-setting authority. Even if Verizon's assertion were true, that would not justify preempting state regulation of intrastate access services for *other* types of calls, such as wireline-to-wireline carrier calls. Yet Verizon fails to make a convincing case for inseparability even as it applies to non-nomadic VoIP and wireless calls. Verizon argues that telephone numbers are not a valid proxy for geographic location, but ignores the Commission's requirement that E911 services be made available to VoIP end users, which is predicated on knowing the physical location of the VoIP end user.[16] If that is known, the end point of the call can be known. Similarly, the E911 requirements applicable to CMRS carriers provide the technology to determine the geographic location of a wireless carrier during any given call, a technology which could be used for the limited additional purpose of determining the jurisdictional nature of a wireless call.[17] At bottom, therefore, Verizon's assertion that "carriers can no longer reliably determine whether a call is local or long distance, intrastate, or interstate in order to apply different rates to each type of traffic"[18] ignores the realities of today's technologies.

Verizon also has not shown that preemption is necessary because continued state regulation threatens to frustrate the achievement of valid federal policies. Verizon contends that in the absence of preemption the FCC could not successfully eliminate the arbitrage that exists under the current intercarrier compensation regime.[19] Yet the record in this docket contains significant evidence regarding a variety of methods available to the Commission to resolve the problems for which Verizon invokes state preemption as the solution. Most importantly, the Commission can – and should – resolve the problem of "Phantom Traffic" by adopting the

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15 *See MTS/WATS I and MTS/WATS II, supra.*

16 *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

17 *See* 47 C.F.R. §20.18(e) ("Licensees subject to this section must provide to the designated Public Safety Answering Point Phase II enhanced 911 service, *i.e.*, the location of all 911 calls by longitude and latitude in conformance with Phase II accuracy requirements").

18 White Paper, at 2.

19 White Paper, at 23.

February 12, 2008 proposal of USTelecom[20] with the March 11, 2008 amendment proposed by NuVox, One Communications Corp., and XO Communications.[21] Specifically, the Commission should establish a binding method for determining the jurisdiction of any call that originates or terminates over the PSTN that allows originating and terminating carriers to bill based upon jurisdiction. The USTelecom proposal, as amended, would achieve this goal by strengthening the signaling rules and clarifying the obligations of parties to negotiate agreements governing the exchange of traffic.[22]

Further, the Commission can – and should – act promptly to bring clarity to the issue of intercarrier compensation for IP-based traffic that terminates on the PSTN.[23] This issue has been pending at the Commission for over a decade and the time is long past for the Commission to resolve this issue. Commission action on the Phantom Traffic and IP-PSTN traffic issues would address the arbitrage problems plaguing the telecommunications industry in a manner that is consistent with the delegation of authority between the FCC and the states as established by Congress.

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO SET RATES FOR TRAFFIC SUBJECT TO SECTION 251(B)(5) OF THE ACT

Verizon presents two arguments to support its claim that the Commission has the legal authority to set rates for traffic subject to Section 251(b)(5) of the Act. *First*, Verizon argues that the Commission can establish a single, default rate for such traffic "using its authority to establish rules to implement the reciprocal compensation duty."[24] In Verizon's view, the Commission can modify the pricing methodology that applies to reciprocal compensation to determine that Verizon's proposed national default rate satisfies the standard in Section 252(d)(2) of the Act for assessing rates for Section 251(b)(5) traffic. In other words, Verizon believes that the Commission can find Verizon's proposed rate to be a reasonable approximation of the additional costs of terminating calls subject to Section 251(b)(5). In making this argument, Verizon ignores both the express language of the Act and relevant case law.

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[20] Letter from Glenn Reynolds, Vice Pres., Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Feb. 12, 2008).

[21] Letter from Thomas Cohen, Counsel to NuVox Communications, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Mar. 11, 2008).

[22] Verizon is a member of USTelecom and, thus, presumably supports the USTelecom proposal.

[23] Any modification to the current treatment of IP-originated traffic to apply access charges should be applied on a prospective-only basis.

[24] White Paper, at 26.

Congress conferred on state commissions explicit authority to set, *inter alia*, rates for traffic subject to reciprocal compensation under Section 251(b)(5). Section 252(c)(2) provides, in relevant part, that state commissions "shall establish any rates for interconnection, services, or network elements, according to subsection (d)." In turn, "subsection (d)" provides, in relevant part, that "a *State commission* shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions . . . determine such costs on the basis of a reasonable and approximation of the additional costs of terminating such calls."[25]

Decisions of the U.S. Supreme Court and the Eighth Circuit confirm that jurisdiction over the actual rates for the exchange of telecommunications traffic covered by Section 251(b)(5) resides with the states. In *AT&T v. Iowa Utilities Board*, the Supreme Court held that the Commission has jurisdiction under Section 201(b) of the Act to implement the local market opening provisions enumerated in Sections 251 and 252 by adopting regulations.[26] At the same time as it reached this holding, however, the Court also ruled that, although the Commission possesses authority under Sections 251 and 252 to design a methodology for use in establishing rates for interconnection and unbundled network elements, the rate setting itself is within the sole province of state commissions pursuant to Section 252.[27] The Eighth Circuit in *Iowa Utilities Board v. FCC* reiterated this point when it struck down the reciprocal compensation and unbundled network element ("UNE") rate proxies that the Commission established in its *Local Competition Order*.[28] The Court explained that while the U.S. Supreme Court in *AT&T v. Iowa Utilities Board* determined that the Commission has jurisdiction to design a pricing methodology, "the FCC does not have the jurisdiction to set the actual prices for the state Commissions to use."[29]

Verizon attempts to circumvent these clear limitations on the Commission's jurisdiction by suggesting that the Commission "modify the pricing methodology" and determine that the *costs* of terminating calls subject to Section 251(b)(5) is $.0007 per minute.[30] The fact that these "costs" would be equal to Verizon's desired uniform default rate in all cases proves

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25 47 U.S.C. §252(d)(2) (emphasis added).

26 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

27 *Id.*, 525 U.S. at 384.

28 *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *see In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

29 *Iowa Utils. Bd.*, 219 F.3d at 757, citing *AT&T v. Iowa Utils. Bd.*, *supra,* 525 U.S. at 385.

30 White Paper, at 26.

that Verizon's argument is nothing more than semantics. Verizon proffers absolutely no support for the conclusion that the $.0007 rate it proposes reflects the costs of terminating all types of traffic under any pricing methodology. Merely labeling the $.0007 rate the "cost" of traffic termination is not enough. The fact remains that the actual charges for terminating traffic subject to Section 251(b)(5) must be determined by the states and not by the FCC. The states must apply the pricing standards in Section 252(d) and implement the Commission's pricing methodology, thereby "determining the concrete result in particular circumstances."[31]

The *second* argument Verizon makes in support of its claim that the Commission can set rates for traffic subject to Section 251(b)(5) is that the Commission can forbear from enforcing Section 251(b)(5) pursuant to its authority under Section 10 of the Act. Under this argument, the Commission would no longer require carriers to enter into reciprocal compensation arrangements that are subject to state commission authority, and would instead require carriers to terminate traffic otherwise subject to Section 251(b)(5) at a single, federal rate.[32] This argument fails as well, as the Commission cannot, under Section 10, forbear from a statutory provision in order to replace it with a regulation that would otherwise not be permitted under the statute. That would turn the Commission into an extra-legislative body that could rewrite Title II of the Act at will, which was not what the Congress envisioned when it gave the Commission forbearance authority.

III. CONCLUSION

For these reasons, the Commission should reject Verizon's legal analysis, and confirm that it lacks the legal authority to adopt Verizon's intercarrier compensation reform plan.

Sincerely,

Genevieve Morelli

Brad E. Mutschelknaus
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Their Attorneys

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31 *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 384.

32 White Paper, at 29.